Drury Construction Co. *and* William Edward Pinkerton. Case 14-CA-14948

March 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On September 28, 1981, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Drury Construction Co., Cape Girardeau, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Member Jenkins would award interest on backpay in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me in St. Louis, Missouri, on August 11, 1981, upon the General Counsel's complaint which alleges that the Respondent, Drury Construction Co., laid off, and has refused to recall, William E. Pinkerton because of Pinkerton's activity on behalf of his Union and because he engaged in protected concerted activity. The Respondent is alleged to have violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* It is also alleged that an agent of the Respondent threatened Pinkerton with probable discharge for engaging in protected concerted activity.

While admitting the layoff of Pinkerton, the Respondent generally denies that it has committed any unfair labor practices and affirmatively contends that Pinkerton was laid off and has not been recalled due to the unavailability of work.

Upon the record as a whole, including my observation of the witnesses and my having given due consideration to the briefs and arguments of counsel, I hereby make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a division of Drury Company Incorporated, a Missouri corporation engaged in the building and construction industry. It annually receives in excess of $50,000 worth of goods, products, and materials directly from outside the State of Missouri. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Local Union No. 574, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

As noted above, the Respondent is a division of Drury Company Incorporated, an organization engaged in various enterprises, including construction, the operation of motels in several midwestern States, and related activities. The Respondent has been engaged in construction since 1950 and since then has had collective-bargaining agreements with various labor organizations representing employees in the construction industry, including the Union.

William Pinkerton has been a member of the Union for about 17 years, and from April 1973 until he was laid off on April 3, 1981, regularly worked for the Respondent as a truckdriver doing work covered by the various collective-bargaining agreements the Respondent had with the Union. These contracts cover employees engaged in "heavy and highway" construction, as opposed to "building" construction.

Beginning in October 1979 Pinkerton principally worked on the Respondent's West Park Mall project, although he occasionally hauled materials and did related work at other of the Respondent's construction sites. On March 31, 1980, the secretary-treasurer of the Union notified the Respondent that Pinkerton had been appointed by the Union to serve as its steward on the Respondent's several projects. Before that time there had been no designated steward among the Union's members working for the Respondent. At the times material herein there were about 24 employees working for the Respondent, of whom only 3 were members of the Union.

Pinkerton testified that he was instructed by the Union to force the various companies working on the mall project, including the Respondent, to assign the work of truckdriving to members of the Union. And he testified that he understood this to be his obligation as a steward and to be required by the collective-bargaining agreement—that the work of truckdriving was to be done by members of the Union.

Thus, Pinkerton testified that, during his time as steward, on 10 or 12 occasions (most of which were in early 1981) he observed members of other crafts, as well as nonunion people, driving trucks. And he undertook to stop this. On these occasions he would have discussions with Martin Jansen, the manager of Drury Construction Co., who told Pinkerton he had no right to tell nonmembers of the Union they could not haul material on the job. Pinkerton responded by stating that it was his job as a steward to attempt to prevent such hauling, which Jansen replied, "Well, who the hell does the Teamsters Union think they are."

In March the Union's business agent visited the West Park Mall project and talked to various subcontractors on the job about not employing members of the Union. The next morning, according to Pinkerton, Jansen stopped him and asked what the problem was. Pinkerton told him and, according to Pinkerton, Jansen said, "All I have to say is you are going to miss a lot of work over this kind of problem."

Jansen testified about this conversation. He denied making the statement attributed to him by Pinkerton, testifying that he said, "We have been working together in the past. We are working together now, and we hope to continue to work together in the future." Jansen testified that the reason he had this conversation with Pinkerton was because Pinkerton was insisting that when trucks were moved a member of the Union do it. Jansen testified that he thought Pinkerton was "overdoing" this "activity."

The Respondent's work on the West Park Mall project was completed on March 5, although the Respondent had another contract at that location to do remodeling work. On April 3 Pinkerton was advised by Jansen that he was laid off for lack of work.

There was some over-the-road truckdriving available, however, if not through the construction company, through other of Drury Company Incorporated's enterprises. However, it was known to the Respondent that Pinkerton did not like over-the-road work. Although Jansen stated that this was one factor in Pinkerton's layoff, the principal reason was lack of work. Jansen further testified:

> Q. Was there work available for Mr. Pinkerton to do after April 3?
>
> A. There was a minimum amount of work.
>
> Q. But nevertheless there was work available?
>
> A. There was work that needed to be performed by someone.

Corroborating Jansen's testimony in this regard, Pinkerton testified that on several occasions following his layoff on April 3 he noticed nonmembers of the Union driving the Respondent's trucks and hauling materials to various construction sites, particularly including the "Silver Spring" project.

Finally, Pinkerton testified that, during the 8 years of his employment with the Respondent, he had been on layoff status a total of only 8 to 12 weeks (apparently exclusive of the winter of 1978 when at his request he was off from work most of that time). It is uncontroverted that, during his tenure of employment, Pinkerton normally worked for the Respondent about 50 weeks a year, much of it on a 40-hour-a-week basis.

Following his layoff on April 3, Pinkerton made several trips to the Respondent's office, and talked to Jansen on at least one occasion asking for work. He was advised that no work was available.

The Respondent brought forth no evidence that following April 3, 1981, its total amount of heavy construction work was substantially diminished from that which it had performed in the previous several years.

B. *Analysis and Concluding Findings*

1. The layoff and failure to recall

An employer may lay off and refuse to reinstate an employee for any reason he chooses other than one proscribed by the Act—because the employee has engaged in union or other concerted activity protected by Section 7. The Respondent admits that Pinkerton was laid off on April 3, 1981. While the Respondent denies the allegation that Pinkerton has not been reinstated, it is clear that he has not, although he applied for work and has been available.

Thus, the principal issue in this matter concerns the Respondent's motive in laying off Pinkerton and/or failing to rehire him. And on this issue, as all others, the General Counsel has the burden of proof. However, where the facts establish *prima facie* that a proscribed motive precipitated the respondent's action, then the burden shifts to the respondent to show that it would have acted in the same way even absent the employee's union or other protected activity. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

On the record before me I am persuaded that the evidence does establish *prima facie* that Pinkerton's activity in attempting to enforce the contract as he understood it (requiring the Respondent and other employees on the construction project to use members of the Union to drive trucks) was the precipitating cause of his layoff and the Respondent's subsequent refusal to rehire him.

Further, I am persuaded that the Respondent has not brought forth sufficient evidence to prove that absent Pinkerton's known activity as steward for the Union he would nevertheless have been laid off and not recalled.

First, it is noted that the Respondent had steady work for Pinkerton for 8 years. Pinkerton testified uncontrovertedly that he worked an average of 50 weeks a year for the Respondent. There is no evidence that the total volume of the Respondent's construction business was so much less after April 3, 1981, that it had no work available for an admittedly senior, and apparently competent, employee.

Jansen testified that after April 3 there was in fact Teamsters work available that "someone had to do." While it is true that Pinkerton had in the past refused to do over-the-road driving, and presumably would have refused it if offered in 1981, nevertheless the Respondent brought forth no persuasive evidence that there was insufficient local construction work available for him to do. Indeed, Jansen's testimony indicates the contrary.

From Jansen's testimony, as well as from Pinkerton's concerning his observation of nonunion employees driving trucks, I certainly can infer that after April the Respondent continued to have Teamsters work available. Jansen's statements to Pinkerton on and after April 3 that the Respondent had no work were not accurate.

The Respondent notes that much of the work of driving its 50 trucks had historically been done by nonmembers of the Union, and that its contract with the Union covers heavy construction. Such does not mean, however, that there was not work available for Pinkerton within the work jurisdiction of the contract. Given Jansen's testimony and the fact that Pinkerton had steady employment for 8 years leads me to conclude that work was available—absent some persuasive evidence to the contrary. The only evidence presented by the Respondent was Jansen's conclusionary statement that the Respondent had no work for Pinkerton at the time he was laid off. No evidence was presented concerning the subsequent availability of work, or the lack of it.

Given that there was in fact work available for Pinkerton and that he was a relatively long-term employee of the Respondent, the question becomes: Why was he laid off on April 3 and why has the Respondent refused to recall him? The only conceivable answer is Pinkerton's activity, particularly in the early part of 1981, of enforcing the contract.[1]

I conclude that the reason that he was laid off was because of his "activities"—Jansen's word. Jansen testified specifically that Pinkerton had attempted to cause the Respondent, and others, to use union members for their truckdriving—work which is covered by the collective-bargaining agreement between the Union and the Respondent. It was Jansen's opinion that Pinkerton had been "overdoing it." Thus, he had a talk with Pinkerton wherein he stated that they (meaning presumably the Union and the Respondent) had worked together before, were working together now, and, he hoped, would work together in the future. Such was a clear statement that Jansen disapproved of Pinkerton's activity in attempting to enforce the collective-bargaining agreement. And it was this activity which I conclude was the precipitating cause of Pinkerton's layoff and the Respondent's refusal to rehire him. The Respondent brought forth no persuasive evidence to establish that absent this activity Pinkerton would have been laid off on April 3 and not recalled.

Accordingly, I conclude that the General Counsel has established by a preponderance of the credible evidence that, in laying off William E. Pinkerton on April 3, 1981, and failing to recall him, the Respondent violated Section 8(a)(3) and (1) of the Act.

2. The alleged threat

The General Counsel contends that, during the Jansen-Pinkerton conversation following the jobsite visit by the Union's business agent, *supra*, Pinkerton was threatened with discharge. There is a substantial and direct conflict between Pinkerton's version of this event and that of Jansen. On balance, I am constrained to credit Jansen and discredit Pinkerton. I found Jansen to be a more reliable witness. His testimony on material matters (including his version of the conversation with Pinkerton) was adverse to the Respondent's interest. While somewhat hesitant, he was nevertheless candid.

I therefore conclude that the conversation occurred as testified to by Jansen. Jansen's statement acknowledged his displeasure with Pinkerton's activity in attempting to enforce the contract, and I rely on this acknowledgment in part in concluding that the Respondent violated Section 8(a)(3). It does not include a threat of loss of work because Pinkerton had engaged in activity on behalf of the Union.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found, occurring in connection with the Respondent's business in the building and construction industry, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having found that the Respondent unlawfully laid off William E. Pinkerton on April 3, 1981, and refused thereafter to rehire him, I shall recommend that it cease and desist therefrom, and offer him full and immediate reinstatement to his former job, without prejudice to any of his rights or seniority previously enjoyed, or, if that job no longer exists, to a substantially equivalent position of employment, and make him whole for any losses he may have suffered as the result of the discrimination against him as provided for in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corporation*, 231 NLRB 651 (1977).[2]

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

[1] There is some indication that Pinkerton attempted to force other subcontractors on the project to use union members. The Respondent thus argues that Pinkerton's activity in this regard was unprotected as being violative of Section 8(b)(4). While such may be, the evidence with regard to precisely what Pinkerton did and the interrelationship between the other contractors and the Respondent is far from clear. Thus, it may be that Pinkerton's activity was perfectly lawful. From the testimony of Jansen, it appears that the Respondent had some kind of an arrangement with other subcontractors whereby Pinkerton would drive for them and they would pay the Respondent for his time. While some of Pinkerton's acts may have been violative of Sec. 8(b)(4), such has not been established with sufficient certainty to conclude that his activity was unprotected.

[2] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[3]

The Respondent, Drury Construction Co., Cape Girardeau, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or refusing to recall or otherwise discriminating against employees because they engage in any activity on behalf of Teamsters Local Union No. 574, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[4]

2. Take the following affirmative action:

(a) Offer full and immediate reinstatement to William E. Pinkerton to his former job, without loss of seniority or other rights and privileges he may have enjoyed, and make him whole for any losses he may have suffered as a result of the discrimination against him in accordance with the formula set forth in the remedy section above.

(b) Make available to the Regional Director, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Cape Girardeau, Missouri, facility, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not found herein be dismissed in all respects.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties were allowed to participate and to call, examine, and cross-examine witnesses, it has been found by the National Labor Relations Board that we have violated the National Labor Relations Act, as amended. We have been ordered to stop such activity, and to post this notice and to abide by its terms.

WE WILL NOT lay off or fail to recall to work any employee because of his activity on behalf of Teamsters Local Union No. 54, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer William E. Pinkerton full and immediate reinstatement to his former job, without loss of benefits, seniority, or other rights and privileges, or, if that job no longer exists, to a substantially equivalent position of employment, and WE WILL make him whole for any losses he may have suffered as a result of the discrimination against him, with interest.

DRURY CONSTRUCTION CO.

---

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] The unfair labor practices involved in this case appear to be isolated and I do not believe that that shows that the Respondent has a proclivity for engaging in unfair labor practices. Accordingly, the narrow injunctive relief is appropriate. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."